CHAPTER 4

LAW OF WAR IN MILITARY OPERATIONS OTHER THAN WAR[1]

REFERENCES

1. Dep't of Defense Directive 5100.77, DoD Law of War Program, 9 December 1998.
2. Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program, 27 August 1999.

Military Operations Other Than War (MOOTW)[2] is the doctrinal term used to describe the broad range of military operations which fall outside the traditional definition of "armed conflict." These diverse operations do not trigger the application of the traditional law of war regimes because of a lack of the legally requisite armed conflict needed to trigger such regimes. This resulting lack of binding traditional legal authority for the resolution of myriad issues during MOOTW has led judge advocates to resort to other sources of law. These sources start with binding customary international law based human rights which must be respected by United States forces at all times. Other sources include host nation law, conventional law, and law drawn by analogy from various applicable sources.

STRUCTURE FOR ANALYSIS

The process of analyzing legal issues and applying various sources of law during a military operation entails four essential steps: 1) define the nature of the issue; 2) ascertain what binding legal obligations, if any, apply; 3) identify any "gaps" remaining in the resolution of the issue after application of binding authority; 4) fill these "gaps" by application of non-binding sources of law as a matter of policy.

When attempting to determine what laws apply to American conduct in an area of operations, a specific knowledge of the exact nature of the operation becomes immediately necessary.[3] For example, in the operations within the Former Yugoslavia, the United States led Implementation Force (IFOR) struggled with defining the exact parameters of its mission. In a pure legal sense, the IFOR is required or authorized (maybe this distinction is where the problem lies) to implement Annex 1-A of the Dayton Accord. Yet the Accord seems to require the following IFOR missions: (1) prevent "interference with the movement of civilian population, refugees, and displaced persons, and respond appropriately to deliberate violence to life and person," and (2) ensure that the Parties "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms."[4]

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[1] For greater detail see Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, Army Law., Nov. 1996.

[2] DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS chs. 2 & 13 (14 June 1993) [hereinafter FM 100-5].

[3] The importance of clear mandates and missions was pointed out as a "critical" lesson learned from the recent Somalia operations. "A clear mandate shapes not only the mission (the what) that we perform, but the way we carry it out (the how)." See Kenneth Allard, Institute for National Strategic Studies- Somalia Operations: Lessons Learned (1995), at 22. Determining the authorizing source of the mission is also crucial when determining who is fiscally responsible for different aspects of the mission.

[4] *See* Dayton Accord, at Annex 1A, arts. I and VI. Operation RESTORE HOPE provides another example of the important relationship between the mission statement and the legal obligation owed to the civilian population. The initial mission statement for RESTORE HOPE articulated in United Nations Resolution 794 granted the United States the authority to take "all necessary means" to establish a "secure environment" in which relief efforts could be coordinated. At this point the obligation to local civilians was clear. The mission was not to assume an active role in protecting the civilians, but instead, to provide security for food and supply transfer. Once the mission was handed over to the United Nations, this mission was permitted to mutate and the obligation to civilians became less clear. The U.S. led force referred to as the Unified Task Force (UNITAF) conducted narrowly prescribed relief operations from December 9, 1992 to May 4, 1993. On May 4, 1993, UNITAF terminated operations and responsibility for the operation was passed to the United Nations in Somalia (UNOSOM). In March and June of 1993, the United Nations passed resolutions 814 and 837, respectively. These two resolutions dramatically enlarged the scope of the United Nations Operation in Somalia (UNOSOM).

In reality, the IFOR, realizing the breadth of a mission with such responsibilities, did not formally acknowledge the obligation to execute either of these mission elements.[5] The result was that the forces on the ground did not have a clear picture of the mission. Fortunately, judge advocates, adept at the difficulty of these type situations, have learned that in the absence of well-defined mission statements, they must gain insight into the nature of the mission by turning to other sources of information.

This information might become available by answering several important questions that shed light on the United States' intent regarding any specific operation. These include: (1) what has the President (or his representative) said to the American People regarding the operation;[6] (2) if the operation is to be executed pursuant to a United Nations mandate, what does this mandate authorize; and (3) if the operation is based upon use of regional organization forces,[7] what statement or directives have been made by that organization?

After gaining the best possible understanding of the mission's objective, the operational lawyer must then go about the business of deciding what bodies of law should be relied upon to respond to various issues. The judge advocate should look to the foregoing considerations and the operational environment and determine what law establishes legally mandated obligations, and then utilize the "law by analogy." Thereafter, he should move to succeeding tiers and determine their applicability. Finally, after considering the application of the regimes found within each of the four tiers, the judge advocate must realize that as the operation changes, the potential application of the regulation within each of the four tiers must be constantly reassessed.

SOURCES OF LAW

FUNDAMENTAL HUMAN RIGHTS

Fundamental human rights are customary international law based rights, obligatory in nature, and therefore binding on the conduct of state actors at all times. These protections represent the evolution of natural or universal law recognized and commented upon by leaders and scholars for thousands of years.[8] The principle behind this body of law is that these laws are so fundamental in nature that all human beings are entitled to receive recognition and respect of them when in the hands of state actors.

Besides applying to all people, the most critical aspect of these rights is that they are said to be non-derogable, that is, they cannot be suspended under any circumstances. As the "minimum yardstick"[9] of protections to which all persons are entitled, this baseline tier of protections never changes. For an extensive discussion of the United States position on the scope and nature of fundamental human rights obligations, see the Human Rights Chapter of this Handbook.

HOST NATION LAW

After considering the type of baseline protections represented by fundamental human rights law, the military leader must be advised in regard to the other bodies of law that he should integrate into his planning and execution phases. This leads to consideration of host nation law. Because of the nature of most MOOTW missions, judge advocates must understand the technical and pragmatic significance of host nation law within the area of operations. Although in theory

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[5] *See* John Pomfret, *Perry Says NATO Will Not Serve As "Police Force" in Bosnia Mission,* WASH. POST, January 4, 1996, at D-1. *See also* Office of Assistant Secretary of Defense (Public Affairs), *Operation Joint Endeavor Fact Sheet*, (Dec. 7, 1995), *available at* Internet: http://www.dtic/bosnia/fs/bos-004.html (reporting that the "IFOR will not act as a police force," but noting that IFOR will have authority to detain any persons who interfere with the IFOR mission or those individuals indicted for war crimes, although they "will not track them down").

[6] Similar sources are (1) the justifications that the President or his cabinet members provide to Congress for the use of force or deployment of troops and (2) the communications made between the United States and the countries involved in the operation (to include the state where the operation is to occur).

[7] Regional organizations such as North Atlantic Treaty Organization (NATO), Organization of American States (OAS), and the Organization of African Unity (OAU).

[8] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701, cmt. [hereinafter RESTATEMENT].

[9] The International Court of Justice chose this language when explaining its view of the expanded application of the type of protections afforded by article 3, common to the four Geneva Conventions. *See* Nicar. v. U.S., 1986 I.C.J. 14 (June 27), *reprinted in* 25 I.L.M. 1023, 1073.

understanding the application of host nation law during military operations is perhaps the simplest component, in practice it is perhaps the most difficult.

Judge advocates must recognize the difference between understanding the technical applicability of host nation law, and the application of that law to control the conduct of U.S. forces during the course of operations. In short, the significance of this law declines in proportion to the movement of the operation toward the characterization of "conflict." Judge advocates should understand that U.S. forces enter other nations with a legal status that exists anywhere along a notional legal spectrum. The right end of that spectrum is represented by invasion followed by occupation. The left end of the spectrum is represented by tourism.[10] So, in a nutshell, our forces enter a nation either as invaders or tourists or somewhere between the two statuses.

When the entrance can be described as invasion, the legal obligations and privileges of the invading force are based upon the list of straightforward rules found within the Law of War. As the analysis moves to the left end of the spectrum and the entrance begins to look more like tourism, host nation law becomes increasingly important, and applies absolutely at the far end of the spectrum. For example, the permissive entry of the 10th Mountain Division into Haiti to execute Operation UPHOLD DEMOCRACY probably represents the mid-point along the foregoing spectrum. Although the force entered with permission, it was not the welcomed guest of the de facto government. Accordingly, early decisions regarding the type of things that could be done to maintain order[11] had to be analyzed in terms of the coalition force's legal right to intervene in the matters of a sovereign state, based in part on host nation law.[12]

The weapons search and confiscation policy instituted during the course of Operation UPHOLD DEMOCRACY is a clear example of this type of deference to host nation law.[13] The coalition forces adopted an approach that demonstrated great deference for the Haitian Constitution's guarantee to each Haitian citizen the right to "armed self-defence, within the bounds of his domicile."[14]

It is important to note that Public International Law assumes a default setting.[15] The classical rule provides that "it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of that place."[16] The modern rule, however, is that in the absence of some type of immunity, forces that find themselves in another nation's territory must comply with that nation's law.[17] This makes the circumstances that move military forces away from this default setting of extreme

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[10] In essence, the category of MOOTW referred to as stability operations frequently place our military forces in a law enforcement type role. Yet, they must execute this role without the immunity from local law that traditional armed conflict grants. In fact, in many cases, their authority may be analogous to the authority of United States law enforcement officers in the territory of another state. "When operating within another state's territory, it is well settled that law enforcement officers of the United States may exercise their functions only (a) with the consent of the other state ... and (b) if in compliance with the laws of the other state...." *See* RESTATEMENT, *supra* note 8, at §§ 433 and 441.

[11] United Nations Security Council Resolution 940 mandated the use of "all necessary means" to "establish a secure and stable environment." Yet even this frequently cited source of authority was balanced with host nation law. *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995 - LESSONS LEARNED FOR JUDGE ADVOCATES 76 (1995) [hereinafter CLAMO HAITI REPORT].

[12] *Id*. at 77. Task Force lawyers advised the military leadership that since President Aristide (as well as Lieutenant General Cedras - the de facto leader) had consented to the entry, "Haitian law would seem to bear" upon coalition force treatment of Haitian civilians.

[13] *See* Operation Uphold Democracy, 10th Mountain Division, Office of the Staff Judge Advocate Multinational Force Haiti After-Action Report 7-9 (March 1995) at 108 [hereinafter 10th Mountain AAR].

[14] HAITI CONST. Art. 268-1 (1987).

[15] *See* DEP'T OF ARMY, PAM. 27-161-1, Law of Peace, Volume I, para. 8-23 (1 September 1979) at 11-1, [hereinafter DA PAM 27-161-1] for a good explanation of an armed forces' legal status while in a foreign nation.

[16] Coleman v. Tennessee, 97 U.S. 509, 515 (1878).

[17] Classical commentaries describe the international immunity of armed forces abroad "as recognized by all civilized nations." GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992) at 225-6 [hereinafter von Glahn]. *See also* WILLIAM W. BISHOP, JR. INTERNATIONAL LAW CASES AND MATERIALS 659-61 (3d ed. 1962) [hereinafter Bishop]. This doctrine was referred to as the Law of the Flag, meaning that the entering force took its law with its flag and claimed immunity from host nation law. Contemporary commentators, including military scholars, recognize the jurisdictional friction between an armed force that enters the territory of another state and the host state. This friction is present even where the entry occurs with the tacit approval of the host state. Accordingly, the United States and most modern powers no longer rely upon the Law of the Flag, except as to armed conflict. DA PAM 27-161-1, *supra* note 15, at 11-1.

importance. Historically, military commentators have stated that United States forces are immune from host nation laws in any one of three possible scenarios:[18]

(1) immunity is granted in whole or part by international agreement;

(2) United States forces engage in combat with national forces; or

(3) United States forces enter under the auspices of a United Nations sanctioned security enforcement mission.

The exception represented by the first scenario is well recognized and the least problematic form of immunity. Yet, most status of forces and stationing agreements deal with granting *members of the force* immunity from host nation criminal and civil jurisdiction. Although this type of immunity is important, it is not the variety of immunity that is the subject of this section. Our discussion revolves around the grant of immunity to the intervention (or sending) force nation itself. This form of immunity benefits the nation directly,[19] providing it with immunity from laws that protect host nation civilians. For example, under what conditions can commanders of United States forces, deployed to the territory of another nation, disregard the due process protections afforded by the host nation law to its own citizens?

Although not as common as a status of forces agreement, the United States has entered into these types of arrangements. In fact the Carter-Jonassaint Agreement[20] is an example of such an agreement. The agreement demonstrated deference for the Haitian government by conditioning its acceptance upon the government's approval. It further demonstrated deference by providing that all multi-national force activities would be coordinated with the "Haitian military high command." This required a number of additional agreements, arrangements, and understandings to define the extent of host nation law application in regard to specific events and activities.

The exception represented by the second scenario is probably the most obvious. When engaged in traditional armed conflict with another national power, military forces care little about the domestic law of that nation. For example, during the Persian Gulf War, the coalition invasion force did not bother to stop at Iraqi traffic lights in late February 1991. The domestic law of Iraq did not bind the invasion force.[21] This exception is based on the classical application of the Law of the Flag theory.[22]

The Law of the Flag has two prongs. The first prong, referred to as the combat exception,[23] is described above, and is exemplified by the lawful disregard for host nation law exercised during such military operations as DESERT STORM. This prong is still in favor and represents the state of the law.[24] The second prong is referred to as the consent exception, described by the excerpt from the United States Supreme Court in *Coleman v. Tennessee* quoted above, and is exemplified by situations that range from the consensual stationing of National Treaty Alliance Organization (NATO) forces in Germany to the permissive entry of multi-national forces in Haiti. The entire range of operations within the consent prong no longer enjoys universal recognition (but to say it is now in disfavor would be an overstatement).[25]

To understand the contemporary status of the Law of the Flag's consent prong, it is helpful to look at the various types of operations that fall within its traditional range. At the far end of this range are those operations that no longer benefit from the theory's grant of immunity. For instance, in nations where military forces have entered based upon true

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[18] Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., Apr. 1995, at 31 [hereinafter Whitaker].

[19] As opposed to the indirect benefit a sending nation gains from shielding the members of its force from host nation criminal and civil jurisdiction.

[20] The entry agreement for Operation UPHOLD DEMOCRACY, *reprinted in* CLAMO HAITI REPORT, *supra* note 11, at 182-83.

[21] This rule is modified to a small degree once the invasion phase ends and formal occupation begins. An occupant does have an obligation to apply the laws of the occupied territory to the extent that they do not constitute a threat to its security. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, arts. 64-78.

[22] *See* Whitaker, *supra* note 18, at 31.

[23] *Id*. at footnotes 34 and 35.

[24] *See* L. OPPENHEIM, INTERNATIONAL LAW, VOL. II, DISPUTES, WAR AND NEUTRALITY 520 (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim]. "In carrying out [the administration of occupied territory], the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare and the maintenance and safety of his forces and the purpose of the war, stand in the foreground of his interests...."

[25] *See* DA PAM 27-161-1, *supra* note 15, at 11-1.

invitations, and it is clear that the relationship between nations is both mature and normal,[26] there is no automatic immunity based upon the permissive nature of the entrance and continued presence. It is to this extent that the consent prong of the Law of the Flag theory is in disfavor. In these types of situations, the host nation gives up the right to have its laws complied with only to the extent that it does so in an international agreement (some type of SOFA).

On the other end of this range are operations that enjoy, at a minimum, a healthy argument for immunity. A number of operational entrances into foreign states have been predicated upon invitations, but of a different type and quality than discussed above. This type of entrance involves an absence of complete free choice on the part of the host nation (or least the *de facto* government of the host nation). These scenarios are more reminiscent of the Law of the Flag's combat prong, as the legitimate use or threat of military force is critical to the characterization of the entrance. In these types of operations, the application of host nation law will be closely tied to the mission mandate and specific operational setting. The importance and discussion of these elements takes us to the third type of exception.

The third exception, although based upon the United Nations Charter, is a variation of the Law of the Flag's combat exception.[27] Operations that place a United Nations force into a hostile environment, with a mission that places it at odds with the de facto government, may trigger this exception. The key to this exception is the mission mandate. If the mandate requires the force to perform mission tasks that are entirely inconsistent with compliance with host nation law then, to the extent of the inconsistency, the force would seem immunized from that law. This immunity is obvious when the intervention forces contemplate the combat use of air, sea, or land forces under the provisions of the United Nations Charter,[28] but the same immunity is available to the extent it is necessary when combat is not contemplated.[29]

The bottom line is that judge advocates should understand what events impact the immunity of their force from host nation laws. In addition, military practitioners should contact the unified or major command to determine the Department of Defense's position regarding the application of host nation law. They must be sensitive to the fact that the decisions, which impact these issues, are made at the interagency level.

CONVENTIONAL LAW

This group of protections is perhaps the most familiar to practitioners and contains the protections that are bestowed by virtue of international law conventions. This source of law may be characterized as the "hard law" that must be triggered by some event, circumstance, or status in order to bestow protection upon any particular class of persons. Examples include the law of war treaties (triggered by armed conflict), the Refugee Convention and its Protocol, weapons/arms treaties, and bi-lateral or multi-lateral treaties with the host nation. Judge advocates must determine what conventions, if any, are triggered by the current operation. Often when treaties have not been legally "triggered," they can still provide very useful guidance when fashioning law by analogy.

LAW BY ANALOGY

Because the primary body of law intended to guide conduct during military operations (the law of war) is normally not triggered during MOOTW, the judge advocate must turn to other sources of law to craft resolutions to issues during such operations. This absence of regulation creates a vacuum that is not easily filled. As indicated earlier, fundamental human rights law serves as the foundation for some resolutions. However, because of the ill-defined nature of imperatives that come from that law, judge advocates need a mechanism to employ to provide the command with "specific" legal guidance in the absence of controlling "specifics." In MOOTW, starting with Operation JUST CAUSE,[30]

[26] Normal in the sense that some internal problem has not necessitated the entrance of the second nation's military forces.

[27] Whitaker, *supra* note 18, at n. 35.

[28] UN CHARTER, Chapter VII, art. 42.

[29] *See* United Nations Resolutions 940 and 1031. Resolution 940 mandated the multi-national force, led by the United States, to enter Haiti and use all necessary means to force Cedras' departure, return President Aristide to power, and to establish a secure and stable environment. The force was obligated to comply with the protective guarantees that Haitian Law provided for its citizens only to the extent that such compliance would not disrupt the accomplishment of these mission imperatives. This is exactly what happened. *See* 10th Mountain AAR, *supra* note 13, at pages 6-9 and 10-11. The same type of approach is being applied by the United States element of the multinational force executing the mandate of Resolution 1031 and the Dayton Accord.

[30] Operation JUST CAUSE is cited as the first (well known) contemporary MOOTW, instead of 1983's Operation URGENT FURY. Although URGENT FURY is frequently cited to as the first MOOTW, it actually represents an international armed conflict. URGENT FURY was the United

and continuing with Operations RESTORE HOPE, UPHOLD DEMOCRACY, and JOINT ENDEAVOR, application of an "analogized" version of the law of war has been employed to fill this gap and provide the command with imperative "specifics."

The license and mandate for utilizing non-binding sources of authority to fill this legal vacuum is established by the Department of Defense's Law of War Program Directive (DOD Directive 5100.77), as implemented by the Joint Chiefs of Staff (CJCSI 5810.01 (1996)). These two authorities direct the armed forces of the United States to apply the law of war to any conflict, no matter how characterized; and to apply principles of the law of war to any operation characterized as a MOOTW. Because of the nature of these MOOTW, sources of law relied upon to resolve various issues extend beyond the law of war. These sources include, but are not limited to, tenants and principles from the law of war, United States statutory and regulatory law, and peacetime treaties. The fit is not always exact, but more often than not, a disciplined review of the international conventional and customary law or any number of bodies domestic law will provide rules that, with moderate adjustment, serve well.

Among the most important rules of applying law by analogy is the enduring importance of the mission statement. Because these rules are crafted to assist the military leader in the accomplishment of his mission, their application and revision must be executed with the mission statement in mind. Judge advocates must not permit rules, promulgated to lend order to mission accomplishment, become missions in and of themselves. There are many ways to comply with domestic, international, and moral laws, while not depriving the leader of the tools he must have to accomplish his mission.

The logical start point for this "law by analogy" process is the law of war. For example, when dealing with treatment of civilians, a logical starting point is the law of war treaty devoted exclusively to the protection of civilians – the fourth Geneva Convention. This treaty provides many detailed rules for the treatment of civilians during periods of occupation, rules that can be relied upon, with necessary modification, by judge advocates to develop treatment policies and procedures. Protocol I, with its definition of when civilians lose protected status (by taking active part in hostilities), may be useful in developing classification of "hostile" versus "non-hostile" civilians. If civilians who pose a threat to the force must be detained, it is equally logical to look to the Prisoner of War Convention as a source for analogy. Finally, with regard to procedures for ensuring no detention is considered arbitrary, the Manual for Courts-Martial is an excellent source of analogy for basic due process type procedures.

Obviously, the listing of sources is not exclusive. JA's should turn to any logical source of authority that resolves the issue, keeps the command in constant compliance with basic human rights obligations, and makes good common sense. These sources may often include not only the law of war and domestic law, but also non-binding human rights treaty provisions, and host nation law. The imperative is that the judge advocate ensure that any policy based application of non-binding authority is clearly understood by the command, and properly articulated to those questioning U.S. policies.

States' unilateral operation to remove a Marxist de facto government (the People's Revolutionary Government), and restore the constitutional government to the tiny Caribbean island of Grenada. Some point to the ostensible legitimate government of Grenada's request for the United States' intervention. One might point out that both the United States and Cuba (the other national force within Grenada) both announced that they were not at war. In spite of these arguments, the United States acknowledged that its military forces did engage Cuban forces in combat. It further acknowledged that, as a consequence, "de facto hostilities existed and that the article 2 threshold was satisfied." See Memorandum, Hugh J. Clausen, to the Vice Chief of Staff of the Army, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983).

APPENDIX A

TREATMENT OF PERSONS

I. FOUR TYPES OF LIBERTY DEPRIVATION:

A. Detainment;

B. Internment;

C. Assigned residence;

D. Simple imprisonment (referred to as confinement in AR 190-57):

1. Includes pre/post-trial incarceration.

2. Pretrial confinement must be deducted from any post-trial period of confinement.

3. A sentence of to imprisonment may be converted to a period of internment.

II. DETAINMENT IN MOOTW.

A. Detainment defined: Not formally defined in International Law. Although it may take on characteristics of confinement, it is more analogous to internment (which is formally defined and explained in the Fourth Geneva Convention (civilian convention)). Within Operation JOINT ENDEAVOR detention was defined as "a person involuntarily taken into custody for murder, rape, aggravated assault, or any act or omission as specified by the IFOR Commander which could reasonably be expected to cause serious bodily harm to (1) civilians, (2) non-belligerents, or (3) IFOR personnel."[31]

B. Detainment is typically authorized (by a designated task force commander) for:

1. Serious crimes (as described above);

2. Posing a threat to U.S. forces (or based upon CINC authority, the coalition force);

3. Violating rules set out by the intervention forces. For example, the IFOR in Operation JOINT ENDEAVOR authorized detainment for persons who attempted to enter controlled areas or attack IFOR property.

4. Obstructing the forces' progress (obstructing mission accomplishment in any number of ways to include rioting, demonstrating, or encouraging others to do so).

C. While these categories have proved effective in past operations, JA's must ensure that the categories actually selected for any given operation are derived from a mission analysis, and not simply from lessons learned.

D. The LOW (and therefore, the Geneva Conventions) does (do) not technically apply to military operations that do not involve armed conflict (MOOTW). However, pursuant to the "law by analogy" methodology, the LOW should be used as guidance during MOOTW.

E. In MOOTW, judge advocates should:

[31] *See* Task Force Eagle: Joint Military Commission Policy and Planning Guidance Handbook (21 Mar. 1996).

1. Advise their units to exhaust all appropriate non-forcible means before detaining persons who obstruct friendly forces.

2. Look to the mission statement to determine what categories of civilians will be detained. The USCINCENT Operation Order for Unified Task Force Somalia (1992) set out detailed rules for processing civilian detainees. It stated:

   > In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will: . . . Detain those accused of criminal acts or other violations of public safety and security.

3. After determining the type of detainees that will find their way into U.S. hands, JA's should determine what protections should be afforded to each detainee.

   a. Detainment SOPs might provide that all detainees will be treated consistently with Common article 3 to ensure respect for fundamental human rights.

   b. Using law by analogy, these protections are translated into rules such as those listed below, which were implemented by the IFOR during Operation JOINT ENDEAVOR:

      (1) Take only items from detainees that pose an immediate threat to members of the force or other detainees.

      (2) Use minimal force to detain or prevent escape (this may include deadly force if ROE permits).

      (3) Searches must be conducted in such a way as to avoid humiliation and harassment.

      (4) Detainees shall be treated humanely.

      (5) Detainees shall not be physically abused.

      (6) Contact with detainees may not be of a sexual nature.

      (7) Detainees may not be used for manual labor or subservient tasks.

4. Apply procedural protections afforded by the host nation to individuals detained under similar conditions. For example, if the host nation permits the right to a magistrate review within so many hours, attempt to replicate this right if feasible.

5. Categorization and Segregation. The SOPs then go on to provide that the detainees will be categorized as either criminal or hostile (force protection threats). Those accused of crimes should be separated from those detained because they pose a threat to the force. In addition, detainees must be further separated based upon clan membership, religious beliefs, or any other factor that might pose a legitimate threat to their safety.

F. In both Somalia and Haiti, the U.S. ran extremely successful Joint Detention Facilities (JDFs). The success of these operations was based upon a simple formula.

1. Detain people based upon a clear and principled criteria.

2. Draft an JDF SOP with clear rules that each detainee must follow and rights to which each detainee is entitled.

3. Base the quantity and quality of the rights upon a principled approach.

G. When applying law by analogy, look to the GC, in addition to the GPW when dealing with civilians. (The practice of JTF judge advocates in Operations RESTORE HOPE and RESTORE DEMOCRACY was to look only to the GPW. This caused a number of problems "because the GPW just did not provide an exact fit.").

III. SNAPSHOT OF MOOTW DETAINMENT RULES (ANALOGIZED FROM THE GC AND OTHER APPLICABLE DOMESTIC AND INTERNATIONAL LAW)

A. Every civilian has the right to liberty and security. NO ONE SHALL BE SUBJECTED TO ARBITRARY ARREST OR DETENTION. This is consistent with the GC requirement that detention be reserved as the commander's last option. GC Art. 42.

B. Treatment will be based upon international law, without distinction based upon "race, colour, sex, language, political or other opinion, national or social origin, property, birth, or other status."

C. No detainee shall be subjected to cruel, inhuman, or degrading treatment.

D. Detain away from dangerous areas. GC Arts. 49 and 83.

E. The place of detainment must possess (to the greatest extent possible) every possible safeguard relative to hygiene and health. GC Art. 85.

F. Detainees must receive food (account shall be taken of their customary diet) and clothing in sufficient quantity and quality to keep them in a good state of health. GC Art. 89.

G. Detainees must be maintained away from PWs and criminals. GC Art. 84. In fact, U.S. commanders should establish three categories of detainees:

1. Those detained because of suspected criminal activity;

2. Those detained because they have been convicted of criminal misconduct;

3. Those detained because they pose a serious threat to the security of the force (an expectation of future activity, whether criminal or not).

H. Detainees shall be detained in accordance with a standard procedure, which the detainee shall have access to. GC Art. 78. Detainees have the right to appeal their detention. The appeal must be process without delay. GC Art. 78.

I. Adverse decisions on appeals must (if possible) be reviewed every six months. GC Art. 78.

J. Detainees retain all the civil rights (HN due process rights), unless incompatible with the security of the Detaining Power. GC Art. 80.

K. Detainees have a right to free medical attention. GC Arts. 81, 91, & 92.

L. Families should be lodged together during periods of detainment. Detainees have the right to request that their children be brought to the place of detainment and maintained with them. GC Art. 82.

M. Forwarding Correspondence.

1. In absence of operational limitations, there is no restriction on the number or length of letters sent or received. In no circumstance, will the number sent fall below two cards and four letters. AR 190-57, para. 2-8.

2. No restriction on whom the detainee may correspond with. AR 190-8, para. 2-8.

3. No restriction on the number or type of correspondence to either military authorities or humanitarian organization.

APPENDIX B

TREATMENT OF PROPERTY

IV. TREATMENT OF PROPERTY.

A. Every person has the right to own property, and no one may be arbitrarily deprived of such property.

B. The property laws of the host nation will control to the extent appropriate under Public International Law (unless displaced by the nature of the operation or because of fundamental incompatibility with mission accomplishment).

1. Consider the entire range of host nation law, from its constitution to its property codes. For example in Operation UPHOLD DEMOCRACY the JTF discovered that the Haitian Constitution afforded Haitians the right to bear arms. This right impacted the methodology of the JTF Weapons Confiscation Program.

C. If a non-international armed conflict is underway, only limited provisions of the law of war apply as a matter of law (primarily common article 3 and Geneva Protocol II). These provisions provide no explicit protection for private property. If an international armed conflict is underway, the property protections found in the Hague Convention and the fourth Geneva Convention apply.

D. Law by Analogy.

1. The occupying power cannot destroy "real or personal property . . . , except where such destruction is rendered absolutely necessary". G.C. Art. 53.

2. **Pillage**. Defined as the "the act of taking property or money by violence." Also referred to as "plundering, ravaging, or looting."

a. Forbidden in all circumstances

b. Punishable as a war crime or as a violation the UCMJ.

c. The property of a protected person may not be the object of a reprisal. (G.C. Art. 33).

d. **Control of Property**. The property within an occupied territory may be controlled by the occupying power to the extent:

(1) Necessary to prevent its use by hostile forces.

OR

(2) To prevent any use which is harmful to the occupying power.

(3) **NOTE**: As soon as the threat subsides, private property must be returned. FM 27-10, Para. 399.

e. Understand the relationship between the battlefield acquisition rules of the law of war and the U.S. Military's Claims System. See the chapter on Claims in this Handbook.

f. Protection of civilian property for persons under the control of our forces (detained persons, etc.). The United States has frequently provided protection of property provided to EPWs under the Third Geneva Convention. For instance, all effects and articles of personal use, except arms and military equipment

shall be retained by an EPW (GPW, art. 18). This same type of protection has a natural extension to civilians that fall under military control.

APPENDIX C

DISPLACED PERSONS

V. TREATMENT OF DISPLACED PERSONS.

A. If a displaced person qualifies for "refugee status" under U.S. interpretation of international law, the U.S. generally must provide such refugees with same treatment provided to aliens and in many instances to a nation's own nationals. The most basic of these protections is the right to be shielded from danger.

1. REFUGEE DEFINED. Any Person:

a. who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;

b. who is outside the nation of his nationality, and, according to United States interpretation of international law (United States v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993)) presents him or herself at the borders of United States territory, and

c. is without the protection of his own nation, either because:

(1) that nation is unable to provide protection, or

(2) the person is unable to seek the protection, due to the well-founded fear described above.

(3) Harsh conditions, general strife, or adverse economic conditions are not considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee.

B. MAIN SOURCES OF LAW:

1. 1951 Convention Relating to the Status of Refugees (RC). The RC bestows refugee status/protection on pre-1951 refugees.

2. 1967 Protocol Relating to the Status of Refugees (RP). The RP bestows refugee status/protections on post-1951 refugees.

a. Adopts same language as 1951 Convention.

b. U.S. is a party (110 ratifying nations).

3. 1980 Refugee Act (8 USC §1101). Because the RP was not self-executing, this legislation was intended to conform U.S. law to the 1967 RP.

a. Applies only to displaced persons who present themselves at U.S. borders

b. This interpretation was challenged by advocates for Haitian refugees interdicted on the high seas pursuant to Executive Order. They asserted that the international principle of "non-refoulment" (non-return) applied to refugees once they crossed an international border, and not only after they entered the territory of the U.S.

c. The U.S. Supreme Court ratified the government interpretation of "non-refoulment" in *United States v. Sale.* This case held that the RP does not prohibit the practice of rejection of refugees at our borders.

(**This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit "refoulment" once a refugee crosses any international border).**

4. Immigration and Nationality Act (8 USC §1253).

   a. Prohibits Attorney General from deporting or returning aliens to countries that would pose a threat to them based upon race, religion, nationality, membership in a particular social group, or because of a particular political opinion held.

   b. Does not limit U.S. authority outside of the U.S. (Foley Doctrine on Extraterritoriality of U.S. law).

5. Migration and Refugee Assistance Act of 1962 (22 § USC §2601).

   a. Qualifies refugees for U.S. assistance.

   b. Application conditioned upon positive contribution to the foreign policy interests of U.S.

C. RETURN/EXPULSION RULE. These rules apply **only** to individuals who qualify as refugees:

1. No Return Rule (RP art. 33). Parties may not return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, social group, or political opinion.

2. No Expulsion Rule (RP arts. 32 & 33). Parties may not expel a refugee in absence of proper grounds and without due process of law.

3. According to the Supreme Court, these prohibitions are triggered only after an individual crosses a U.S. border. This is the critical distinction between the U.S. and UNHCR interpretation of the RP which creates the imperative that refugees be intercepted on the high seas and detained outside the U.S.

D. FREEDOMS AND RIGHTS. Generally, these rights bestow (1) better treatment than aliens receive, and (2) attach upon the entry of the refugee into the territory of the party.

1. Freedom of Religion (equal to nationals).

2. Freedom to Acquire, Own, and Convey Property (equal to aliens).

3. Freedom of Association (equal to nationals).

4. Freedom of Movement (equal to aliens).

5. Access to Courts (equal to nationals).

6. Right to Employment (equal to nationals with limitations).

7. Right to Housing (equal to aliens).

8. Public Education (equal to nationals for elementary education).

9. Right to Social Security Benefits (equal to nationals).

10. Right to Expedited Naturalization.

E. DETAINMENT (See MOOTW DETAINMENT above).

1. U.S. policy relative to Cuban and Haitian Displaced Persons was to divert and detain.

2. General Principles of International Law forbid "prolonged & arbitrary" detention (detention that preserves national security is not arbitrary).

3. No statutory limit to the length of time for detention (4 years held not an abuse of discretion).

4. Basic Human Rights apply to detained or "rescued" displaced persons.

F. POLITICAL ASYLUM. Protection and sanctuary granted by a nation within its borders or on the seas, because of persecution or fear of persecution as a result of race, religion, nationality, social group, or political opinion.

G. TEMPORARY REFUGE. Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. NEITHER POLITICAL ASYLUM NOR TEMPORARY REFUGE IS A CUSTOMARY LAW RIGHT. A number of plaintiffs have attempted to assert the right to enjoy international temporary refuge has become an absolute right under customary international law. The federal courts have routinely disagreed. Consistent with this view, Congress intentionally left this type of relief out of the 1980 Refugee Act.

1. U.S. POLICY.

a. Political Asylum.

(1) The U.S. shall give foreign nationals full opportunity to have their requests considered on their merits.

(2) Those seeking asylum shall not be surrendered to a foreign jurisdiction except as directed by the Service Secretary.

(3) These rules apply whether the requester is a national of the country wherein the request was made or from a third nation.

(4) The request must be coordinated with the host nation, through the appropriate American Embassy or Consulate.

(5) This means that U.S. military personnel are never authorized to grant asylum.

b. Temporary Refuge. The U.S., in appropriate cases, shall grant refuge in foreign countries or on the high seas of any country.

(1) This is the most the U.S. military should ever bestow.

H. IMPACT OF WHERE CANDIDATE IS LOCATED.

1. IN TERRITORIES UNDER EXCLUSIVE U.S. CONTROL AND ON HIGH SEAS:

a. Applicants will be received in U.S. facilities or on aboard U.S. vessels.

b. Applicants will be afforded every reasonable protection.

c. Refuge will end only if directed by higher authority (i.e., the Service Secretary).

d. Military personnel may <u>not</u> grant asylum.

e. Arrangements should be made to transfer the applicant to the Immigration and Naturalization Service ASAP. Transfers don't require Service approval (local approval).

f. All requests must be forwarded in accordance with AR 550-1, para 7.

g. Inquiries from foreign authorities will be met by the senior Army official present with the response that the case has been referred to higher authorities.

h. No information relative to an asylum issue will be released to public, without HQDA approval.

(1) Immediately report all requests for political asylum/temporary refuge" to the Army Operations Center (AOC) at Commercial (703) 697-0218 or DSN 227-0218.

(2) The report will contain the information contained in AR 550-1.

(3) The report will not be delayed while gathering additional information

(4) Contact International and Operational Law Division, Army OTJAG (or service equivalent). The AOC immediately turns around and contacts the service TJAG for legal advice.

2. IN FOREIGN TERRITORIES:

a. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge.

b. The senior Army officer may grant refuge if he feels the elements are met: If individual is being pursued or is in imminent danger of death or serious bodily injury.

c. If possible, applicants will be directed to apply in person at U.S. Embassy.

d. During the application process and refuge period the refugee will be protected. Refuge will end only when directed by higher authority.